

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10  
11

12 THE LINCOLN NATIONAL LIFE )  
13 INSURANCE COMPANY, )

14 Plaintiff, )

15 v. )

16 )  
17 PAMELA MCCLENDON, )

18 Defendant. )  
19 )  
20 )

CV 15-3771-RSWL-Ex

ORDER re: Plaintiff's  
Motion for Partial  
Summary Judgment or in  
the Alternative Summary  
Adjudication [36]

21 Currently before the Court is Plaintiff The Lincoln  
22 National Life Insurance Company's ("Plaintiff") Motion  
23 for Partial Summary Judgment, or in the Alternative,  
24 Summary Adjudication ("Motion") as to its claim for  
25 Money Had and Received against Defendant Pamela  
26 McClendon ("Defendant") [36]. Having reviewed all  
27 papers submitted pertaining to this Motion, the Court  
28 **NOW FINDS AND RULES AS FOLLOWS:** The Court **GRANTS**

1 Plaintiff's Motion [36].

2 **I. BACKGROUND**

3 **A. Factual Background**

4 Plaintiff is an Indiana corporation authorized to  
5 do business in California. Compl. ¶ 1, ECF No. 1.  
6 Defendant is the daughter of Netha McClendon, the  
7 recipient of an annuity ("the Annuitant"). Id. at ¶ 5.

8 On August 13, 1992, Alexander Hamilton Life  
9 Insurance Company of America issued a Single Life  
10 Immediate Annuity, No. 4000073334 ("the Annuity") to  
11 the Annuitant. Id.; Compl. Ex. 1, ECF No. 1-1. In  
12 October 1995, Jefferson Pilot Life Insurance Company  
13 ("Jefferson") acquired the Annuity. Id. at ¶ 6. In  
14 April 2007, after merging with Jefferson, Plaintiff  
15 acquired ownership of the Annuity and its  
16 rights/obligations. Id. Starting September 20, 1992,  
17 the Annuitant would receive \$3,000.00 monthly under the  
18 "Single Life Immediate Annuity - Life Only" option.  
19 Id. at ¶ 7; Compl. Ex. 1. Pursuant to the Annuity,  
20 Plaintiff would make payments "as long as the Measuring  
21 Life [the Annuitant] is living." See Compl. ¶¶ 8, 9,  
22 Ex. 1 at 8. If the Annuitant died before all payments  
23 were made, "the remaining guaranteed payments will be  
24 paid, when due, to the Designated Beneficiary." Id.  
25 The "Beneficiary" box on the Annuitant's contract  
26 states: "Not Applicable." Compl. Ex. 1.

27 The Annuitant died on January 6, 1998. Compl. ¶¶  
28 9, 10. Defendant did not inform Plaintiff of the

1 Annuitant's death. Id. at ¶ 13. As a result,  
2 Plaintiff made 190 monthly payments to Annuitant—who it  
3 thought was still alive—from January 1998 to October  
4 2013, totaling \$570,000. Id. at ¶¶ 10, 16. The checks  
5 were sent to the Annuitant's last-known address, where  
6 Plaintiff alleges Defendant was living. Id. at ¶ 11.  
7 Plaintiff alleges that Defendant deposited the mistaken  
8 overpayments into her bank account. Id. Sometime in  
9 2006, the Annuitant purportedly signed a Deed of Trust  
10 transferring her property to Defendant, even though the  
11 Annuitant had been dead for eight years. Decl. of  
12 Douglas Burdick ("Burdick Decl.") ¶ 4, Ex. 2, ECF No.  
13 36-2. On March 6, 2009, a caller identifying herself  
14 as the Annuitant allegedly called Plaintiff, provided a  
15 birth date and social security number, and requested  
16 reinstatement of payments. Id. at ¶ 7, Ex. 5, ECF No.  
17 36-2.

18 Plaintiff alleges that it was unaware of the  
19 overpayments until October 2013. Compl. ¶ 16. On  
20 December 18, 2013, Plaintiff sent letters to the  
21 Annuitant's family, informing them of the overpayments  
22 and requesting reimbursement. Id. at ¶ 17. On May 19,  
23 2014, Defendant allegedly admitted responsibility for  
24 the overpayments, but has yet to pay any of them back.  
25 Id. at ¶¶ 18-19.

26 **B. Procedural Background**

27 On May 19, 2015, Plaintiff filed its Complaint,  
28 alleging the following claims: (1) Unjust Enrichment;

(2) Money Had and Received; (3) Money Paid; (4) Conversion; (5) Imposition of a Constructive Trust. Compl. ¶¶ 21-23; 28-29; 35; 40; 45.

On December 21, 2016, the final day of its motion filing cut-off date, Plaintiff filed the instant Motion as to the Claim for Money Had and Received and its Separate Statement of Uncontroverted Facts and Conclusions of Law ("SUF") [36-1]. Defendant's Opposition was due on January 3, 2017. Defendant missed this deadline and filed an *ex parte* application requesting an extension of time to file the Opposition [40]. The Court granted the *ex parte* application, allowing Defendant until 5 P.M. on January 6, 2017 to file its Opposition [42]. On January 6, Defendant filed its Opposition, Statement of Genuine Issues of Material Fact, Objections to Plaintiff's Motion, and Declarations [46, 47, 49]. Plaintiff's Reply was timely filed on January 10, 2017 [51].

## II. FINDINGS OF FACT

1. The Annuitant died on January 6, 1998. Pl.'s Facts ¶ 5; see Decl. of Daniel S. Imber ("Imber Decl."), Ex. 7 at 10:4-5, ECF No. 36-3.
2. The Annuity Contract provided for a monthly benefit payment of \$3,000 under the Life Only option. Pl.'s Stmt. of Uncontroverted Facts ("Pl.'s Facts") ¶ 2, ECF No. 36-1; see Decl. of Douglas Burdick ("Burdick Decl.") ¶ 3, Ex. 1, ECF No. 36-2 (undisputed).

3. Between January 12, 2007 and October 14, 2013, Plaintiff issued 80 checks, \$3,000 each, payable and addressed to the Annuitant, Netha McClendon. Pl.'s Facts ¶ 4; see Burdick Decl. ¶ 8, Ex. 6 (undisputed).

## II. DISCUSSION

### A. Legal Standard

#### 1. Motion for Summary Judgment

Federal Rule of Civil Procedure 56 states that a "court shall grant summary judgment" when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The party moving for summary judgment has the initial burden of proof to show "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a); In re Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010). "A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by: citing to particular materials in the record, including . . . stipulations." Fed. R. Civ. P. 56(c)(1)(A). "In determining any motion for summary judgment . . ., the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in

1 opposition to the motion." Local Rule 56-3.

2 Where the non-moving party bears the burden of  
3 proof at trial, the moving party need only prove that  
4 there is an absence of evidence to support the non-  
5 moving party's case. In re Oracle Corp., 627 F.3d at  
6 387. If the moving party meets this burden, the burden  
7 then shifts to the non-moving party to produce  
8 admissible evidence showing a triable issue of fact.  
9 Id.; Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210  
10 F.3d 1099, 1102-03 (9th Cir. 2000); see Fed. R. Civ. P.  
11 56(a).

12 2. Partial Summary Judgment

13 Federal Rule of Civil Procedure 56(g) authorizes  
14 courts to grant partial summary judgment in order to  
15 limit the issues to be tried in a case. State Farm  
16 Fire & Cas. Co. v. Geary, 699 F. Supp. 756, 759 (N.D.  
17 Cal. 1987) (citing Lies v. Farrell Lines, Inc., 641  
18 F.2d 765, 769 n.3 (9th Cir. 1981)). Absent a specific  
19 statute authorizing otherwise, a partial summary  
20 judgment under Rule 56(g) is not a final judgment but  
21 rather an interlocutory summary adjudication or a  
22 pre-trial order, neither of which is appealable prior  
23 to the entry of a final judgment in the case. Wynn v.  
24 Reconstruction Fin. Corp., 212 F.2d 953, 956 (9th Cir.  
25 1954).

26 ///

27 ///

28 ///

1 **B. Analysis**

2 1. Defendant's Evidentiary Objections

3 a. *Objections to Plaintiff's Exhibits*

4 Defendant objects to the copy of the Annuity  
5 contract and Call Log Transcript and Log  
6 Notes—reflecting the March 2009 and May 2014 phone  
7 conversations—on the grounds of improper  
8 authentication, hearsay, and lack of foundation.  
9 Def.'s Objs. To Decl. & Exs. ("Def.'s Objs.") 2:8-13,  
10 ECF No. 49; Burdick Decl. Exs. 1-2; 4-5.

11 "A document which lacks a proper foundation to  
12 authenticate it cannot be used to support a motion for  
13 summary judgment." Hal Roach Studios Inc. v. Richard  
14 Feiner & Co., Inc., 896 F.2d 1542, 1551 (9th Cir.  
15 1989). As required by Rule 56, documentary materials  
16 need authentication through affidavits or declarations  
17 from individuals with personal knowledge of the  
18 document. Zoslaw v. MCA Distrib. Corp., 693 F.2d 870,  
19 883 (9th Cir. 1982).

20 The aforementioned documentary evidence to which  
21 Defendant objects was properly authenticated in the  
22 Supplemental Declaration of Douglas Burdick, attached  
23 to Plaintiff's Reply. Mr. Burdick is Plaintiff's Vice  
24 President and custodian of records with personal  
25 knowledge of these business records. Supp. Decl. of  
26 Douglas F. Burdick ("Supp. Burdick Decl.") ¶ 1, ECF No.  
27 51-1. Mr. Burdick demonstrates personal knowledge of  
28 the declaration's contents as Plaintiff's Vice

1 President who personally reviewed and is "familiar with  
2 the files in this Action, the records of Plaintiff as  
3 they pertain to this matter, and Plaintiff's policies."  
4 Id.; Curley v. Wells Fargo & Co., 120 F. Supp. 3d 992,  
5 998-99 (N.D. Cal. 2015) (Vice President of Loan  
6 Documentation who personally reviewed loan-related  
7 records at issue and affirmed that records were made in  
8 ordinary course of business established her familiarity  
9 with the records).

10 Moreover, although Defendant objects to the  
11 documentary evidence as inadmissible hearsay, the  
12 evidence fits within the business-records exception.<sup>1</sup>  
13 As set forth in the declaration, the records were made  
14 at or near the time of the recorded events and  
15 maintained in the ordinary course of Plaintiff's  
16 business by an individual with personal knowledge.

17 Supp. Burdick Decl. ¶ 1. As such, the Court **OVERRULES**  
18 Defendant's objections on hearsay, lack of foundation,  
19 and lack of authentication grounds to the Annuity  
20 Contract, Transcript from Call Logs and log notes, and  
21 March 6, 2009 copy of the log notes prepared by

22 ///

---

24 <sup>1</sup> Under this exception, a document is admissible if its  
25 proponent shows: (1) that the record was made at or near the time  
26 of the event; (2) that the record was made by or from information  
27 transmitted by a person with knowledge; (3) that the record was  
28 kept in the course of a regularly conducted activity of a  
business or organization; and (4) that it was a regular practice  
of that business or organization to make such a record. Fed. R.  
Evid. 803(6).



1 Plaintiff's customer service representatives [49].<sup>2</sup>

2           b. *Objections to Douglas Burdick Declaration*

3           Defendant objects to several paragraphs of the  
4 Burdick Declaration [36-2]. Defendant objects on  
5 largely redundant grounds: lack of personal knowledge,  
6 hearsay, relevance, conclusory/lacks foundation. See  
7 generally Def.'s Objs.<sup>3</sup>

8           Because many of Defendant's objections are  
9 boilerplate and "devoid of any specific argument or  
10 analysis as to why any particular exhibit or assertion  
11 in a declaration should be excluded," United States v.  
12 HVI Cat Canyon, Inc., ---F. Supp. 3d---, 2016 WL  
13 7011348, at \*5 (C.D. Cal. Sept. 30, 2016), the Court  
14 **OVERRULES** all of Defendant's objections as to  
15 paragraphs 3, 6, 7, and 10 of the Burdick Declaration  
16 [49].<sup>4</sup> See Amaretto Ranch Breedables v. Ozimals, Inc.,

---

18           <sup>2</sup> Defendant also objects to the Deed of Trust, in which  
19 Defendant allegedly forged her mother's signature to transfer  
20 property to herself. Burdick Decl. ¶ 4, Ex. 2. This Deed of  
21 Trust allegedly contained the real property address to which  
22 Plaintiff mistakenly sent the Annuitant's overpayments. Mot.  
23 3:23-26. Because the Court does not consider this piece of  
24 evidence in reaching its conclusions on this Motion, it **SUSTAINS**  
25 as **MOOT** this Objection.

26           <sup>3</sup> As to all paragraphs the Court considered in its Motion,  
27 Defendant objects on lack of personal knowledge grounds. Fed R.  
28 Evid. 602. Defendant objects to all paragraphs, except for  
paragraph 10, on hearsay grounds and conclusory/lacks foundation.  
Fed R. Evid. 801, 803. Defendant attacks paragraphs 4, 6, and 7  
on lack of authentication grounds. Fed R. Evid. 901.

<sup>4</sup> Defendant objects to paragraph 4 of the Declaration where  
Mr. Burdick states that Plaintiff obtained a Deed of Trust,  
purportedly signed and notarized after the Annuitant's death,

1 907 F. Supp 2d 1080, 1081 (N.D. Cal. 2012) (summarily  
2 overruling boilerplate objections that parties failed  
3 to develop); Doe v. Starbucks, Inc., No. SACV 08-0582  
4 AG (CWx), 2009 WL 5183773, at \*1 (C.D. Cal. Dec. 18,  
5 2009)("[I]n motions for summary judgment with numerous  
6 objections, it is often unnecessary and impractical for  
7 a court to methodically scrutinize each objection and  
8 give a full analysis of each argument raised.")

9 Even if the evidentiary objections are pertinent,  
10 the Court is not satisfied that it should strike any of  
11 the contested paragraphs in the Burdick Declaration.  
12 Indeed, many of Defendant's rote objections can be  
13 handled in one fell swoop. Many of the statements Mr.  
14 Burdick makes are objected to as lacking personal  
15 knowledge and conclusory/lacks foundation. Pursuant to  
16 Federal Rule of Evidence 602, "[e]vidence to prove  
17 personal knowledge may consist of the witness's own  
18 testimony." As Plaintiff's Vice President and  
19 custodian of records, Burdick Decl. ¶¶ 1, 2, Mr.  
20 Burdick states that he has personal knowledge—and he  
21 plausibly does—of Plaintiff's business records,  
22 including the Annuity contract, call logs, call  
23 transcripts, and Plaintiff's general practice of

24  
25 \_\_\_\_\_  
26 transferring property from the Annuitant to Defendant. Defendant  
27 objects on grounds of relevance, lack of personal knowledge, lack  
28 of authentication, hearsay, and conclusory/lacks foundation. The  
Court **SUSTAINS** these objections as **MOOT** because it does not rely  
on any of the specific portions of the Burdick Declaration to  
which Defendant objects.

1 learning of an annuitant's death after checks are  
2 returned or family members contact Plaintiff.

3 The hearsay objections can also be disposed of  
4 because many of the documents at issue are admissible  
5 under the business-records exception, party admissions,  
6 or admissions against interest. Supp. Burdick Decl. ¶¶  
7 1, 2 ("[T]he records . . . were made at or about the  
8 time of the events recorded, and are maintained in the  
9 ordinary course of Lincoln's business.") And the  
10 relevance objections to paragraphs 6, 7, and 10 are  
11 also improper, as the pieces of evidence objected to  
12 all have a tendency to prove or disprove material  
13 elements of the Money Had and Received claim, including  
14 whether Defendant received the money at issue.<sup>5</sup>

## 15 2. Plaintiff's Evidentiary Objections

### 16 a. *Objections to Pamela McClendon Declaration*

17 Plaintiff objects to the Declaration and  
18 Supplemental Declaration of Pamela McClendon [46-1, 50]  
19

---

20 <sup>5</sup> The Court also **OVERRULES** Defendant's blanket objections to  
21 paragraphs 6 and 7 on lack-of-authentication grounds. The Court  
22 already concluded in supra Part II.B.1.a. that the same exhibits  
23 in the Burdick Declaration were properly authenticated by the  
24 attached declaration from an individual with personal knowledge  
25 of their contents. And if Defendant claims lack of  
26 authentication as to some other part of the paragraph, she fails  
27 to develop the objection in that respect. Defendant also does  
28 not provide a thorough analysis for some of her other objections  
or explain their relevance to the Court's determination,  
including "speculative as to the intention of the caller" for the  
phone conversation transcripts and logs. She also fails to  
explain how the phone conversations between Defendant and  
Plaintiff's customer service representatives were "inadmissible  
settlement negotiations." Def.'s Objs. 3:12-14, 3:20-21. The  
Court finds no reason to sustain those objections as well.

1 as they are unsigned and impermissibly contain her "e-  
2 signature,"<sup>6</sup> and lack credibility. Plaintiff also  
3 generally objects to statements in the Declaration that  
4 Defendant's sister and mother communicated to her as  
5 inadmissible hearsay. The Court **OVERRULES** each of  
6 these objections.

7 Plaintiff objects to the McClendon Declaration as  
8 lacking credibility and self-serving because it  
9 contradicts statements made during Defendant's  
10 deposition. The sham affidavit rule prevents a party  
11 from "creat[ing] an issue of fact by an affidavit  
12 contradicting his prior deposition testimony." Van  
13 Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir.  
14 2009). The Court must make a factual finding that (1)  
15 the contradiction is a "sham;" and the (2)  
16 "inconsistency between a party's deposition testimony  
17 and subsequent [declaration] . . . is clear and  
18 unambiguous." Id. Plaintiff highlights inconsistencies  
19 between the declaration and Defendant's deposition  
20 testimony. For example, she states that she only  
21 started depositing the Annuitant's checks in April 2012  
22 after her sister died. McClendon Decl. ¶ 7. But in  
23 her deposition, she testified that she deposited checks  
24

---

25 <sup>6</sup> For declarations signed by individuals other than CM/ECF  
26 Filers, Local Rule 5-4.3.4 requires a hand-signed signature. It  
27 appears that Defendant is not a registered CM/ECF filer.  
28 Plaintiff asks the Court to strike the declaration because  
Defendant has failed to properly sign it, but does not  
sufficiently develop this objection to compel the Court to strike  
the declaration in its entirety.

1 long before her sister's death. McClendon Dep. 40:19-  
2 41:14, Dec. 6, 2016, ECF No. 36-3. Plaintiff also  
3 contrasts Defendant's statement that she relied on what  
4 her mother and sister told her (rather than the Annuity  
5 contract) with her deposition testimony that she never  
6 spoke to her mother about the Annuity. Compare  
7 McClendon Decl. ¶ 9, with McClendon Dep. 40:19-41:14.

8       These alleged inconsistencies are insufficient to  
9 render the declaration a sham. The aforementioned  
10 contradictions are not necessarily a "sham" but may be  
11 more so a symptom of Defendant's own confusion as to  
12 the precise timeline of events or her attempt to  
13 clarify her prior testimony. Messick v. Horizon  
14 Indus., Inc., 62 F.3d 1227, 1231 (9th Cir. 1995)  
15 ("[M]inor inconsistencies that result from an honest  
16 discrepancy, a mistake, or newly discovered evidence  
17 afford no basis for excluding an opposition  
18 affidavit.") Similarly, the Court cannot say with  
19 certainty that the inconsistencies are clear and  
20 unambiguous. In her declaration, Defendant states that  
21 she "relied upon what my mother and sister told me,"  
22 but it is unclear whether this refers to conversations  
23 about the Annuity or other matters. The Court cannot  
24 confidently say that this is clearly inconsistent with  
25 her deposition testimony that she never spoke to her  
26 mother regarding the Annuity. And the deposition  
27 testimony makes no palpable contradiction as to  
28 conversations had with her sister. Because the Court

1 should not make definitive credibility determinations  
 2 on a Motion for Summary Judgment, and the sham  
 3 affidavit rule is typically cautiously applied, the  
 4 Court **OVERRULES** Plaintiff's objections to the McClendon  
 5 Declaration. Van Asdale, 577 F.3d at 998.<sup>7</sup>

6           b. *Objections to Chandler Parker Declaration*

7           Plaintiff objects to the Declaration of Chandler  
 8 Parker [48] because the declarant "did not attach  
 9 identifying information for the discovery responses and  
 10 misstates the evidence." Reply 7:22-24. Discovery  
 11 documents produced during a Motion for Summary Judgment  
 12 require proper authentication through a declaration.  
 13 The Court **OVERRULES** this objection, as it sees no issue  
 14 with the copy of Plaintiff's internal policy and AWD  
 15 History Report, as they were produced during discovery  
 16 and Plaintiff apparently does not contest their  
 17 authenticity but instead vaguely complains that they  
 18 lack "identifying information." Maljack Prods., Inc.  
 19 v. GoodTimes Home Video Corp., 81 F.3d 881, n.12 (9th  
 20 Cir. 1996) (documents on party's letterhead and  
 21 produced during discovery, attached to a declaration

---

22  
 23           <sup>7</sup> The Court also **OVERRULES** Plaintiff's hearsay objection to  
 24 any statements in the McClendon Declaration made by the Annuitant  
 25 or Delores McClendon. Reply 7:19-21. Problematically, Plaintiff  
 26 does not point out specific statements it claims is hearsay. The  
 27 Court can only find that Defendant mentions she deposited  
 28 Plaintiff's checks "[p]ursuant to the directions of Delores,"  
 McClendon Decl. ¶ 7, and "relied upon what my mother and sister  
 told me." Supp. McClendon Decl. ¶ 9. These are not oral or  
 written assertions constituting a "statement" under the hearsay  
 definition, nor does Plaintiff show how they are "nonverbal  
 conduct . . . intended as an assertion." Fed R. Evid. 801(a).

were properly admitted.)<sup>8</sup>

### 3. Whether the Claim is Barred by the Statute of Limitations

Before deciding whether there is a genuine dispute of material fact for the Money Had and Received claim, the Court must contend with whether its applicable statute of limitations has lapsed.

A claim for Money Had and Received is essentially an action on an implied contract and thus is subject to a two-year statute of limitations. See Murphy v. Am. Gen. Life Ins. Co., 74 F. Supp. 3d 1267, 1280 (C.D. Cal. 2015); Cal. Code Civ. Proc. § 339(1) (two-year limitations period applies to actions for contracts "not founded upon an instrument of writing.") The statute of limitations accrues upon plaintiff's "discovery of the loss or damage." Code Civ. Proc. § 339(1).

---

<sup>8</sup> The Court also **OVERRULES** the objection that the Parker Declaration misstates the evidence. Exhibit B contains Plaintiff's response as to when it received notice of Annuitant's death. Parker Decl. ¶ 3. The interrogatory correspondingly states that Plaintiff received a report of the Annuitant's death in January 2009. Parker Decl. Ex. B at 2:19-20.

Plaintiff also objects to Defendant's "late-filed documents" and failure to comply with the Court's *ex parte* order extending time for Defendant to file its Opposition until 5 P.M. on January 6, 2017 [42]. Defendant did so, filing its opposition before the deadline. Defendant mostly complied with this Order. The Court declines at this time to split hairs over the belatedness, later on the evening of the 6th, during which Defendant filed various attachments to its Opposition, its Declarations, its Evidentiary Objections, and its Statement of Genuine Disputes of Material Fact. The Court **OVERRULES** this objection.

1 The parties dispute the precise date when the  
 2 statute of limitations began to run.<sup>9</sup> The Complaint was  
 3 filed on May 19, 2015 [1]. Defendant argues that the  
 4 Action accrued in January 2009, when Plaintiff  
 5 discovered the Annuitant's death by using its  
 6 Repetitive Payment System Pension Benefit Inquiry  
 7 ("RPSPBI") system to cross-check her against the Social  
 8 Security Index. Opp'n 6:21-23; Parker Decl. Ex. A, ECF  
 9 No. 48-2. At the very least, Defendant argues, whether  
 10 Plaintiff had inquiry notice at this time is a question  
 11 of fact for the jury. Id. at 7:1-2. Plaintiff  
 12 counters that in March 2009, an individual—at the time,  
 13 Plaintiff assumed the Annuitant—called Plaintiff,  
 14 furnished the Annuitant's birth date and social  
 15 security number to indicate she was still alive, and  
 16 continued to endorse and deposit the reinstated Annuity  
 17 payments. Reply 3:19-26; Burdick Decl. ¶ 7, Ex. 5.  
 18 These fraudulent activities tolled the statute of  
 19 limitations until at least October 2013, when Plaintiff  
 20 learned of the Annuitant's death. Id. at 3:26-4:1.

21 Defendant offers evidence, in the form of  
 22 Plaintiff's interrogatory responses, that Plaintiff  
 23 \_\_\_\_\_

24 <sup>9</sup> Both parties rely on the three-year statute of limitations  
 25 in California Code of Civil Procedure § 338, reserved for actions  
 26 based on "fraud or mistake," including unjust enrichment and  
 27 conversion. The parties use this statute of limitations because  
 28 Defendant allegedly fraudulently endorsed checks on the  
 Annuitant's behalf, inducing Plaintiff to mistakenly make  
 payments. The appropriate statute of limitations for a Money Had  
 & Received claim is two years, and the Court's analysis thus  
 flows from the section 339(1) statute of limitations.



1 typically runs RPSPBI reports to determine if an  
2 annuitant has died and its admission that it received a  
3 report in January 2009 indicating that Annuitant may  
4 have died. Parker Decl. Ex. B, ECF No. 48-2.  
5 Defendant also proffers an AWD History report showing  
6 Plaintiff's access to the Social Security Index that  
7 would tell it that Annuitant had died. Defendant uses  
8 this evidence to make much of Plaintiff's January 2009  
9 discovery of the Annuitant's death. But Plaintiff  
10 never disputes that it received a report in January  
11 2009 of the Annuitant's death and properly ceased  
12 Annuity payments. Mot. 3:21. The precise issue,  
13 rather, is whether the statute of limitations was  
14 tolled beginning in March 2009 when Defendant  
15 purportedly called Plaintiff, pretending to be the  
16 Annuitant.

17 The statute of limitations may be tolled under the  
18 doctrine of fraudulent concealment. "[W]hen the  
19 defendant is guilty of fraudulent concealment of the  
20 cause of action the statute [of limitations] is deemed  
21 not to become operative until the aggrieved party  
22 discovers the existence of the cause of action." Yumul  
23 v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1130  
24 (C.D. Cal. 2010) (internal quotation marks omitted)  
25 (quoting Unruh-Haxton v. Regents of Univ. Of Cal., 162  
26 Cal. App. 4th 343, 367 (Ct. App. 2008)).

27 Even if January 2009 is the logical starting point  
28 and assuming that the Action was feasibly barred by the

1 two-year statute of limitations, Plaintiff has set  
2 forth sufficient evidence that the statute of  
3 limitations is tolled by the fraudulent concealment  
4 doctrine. Although the RPSPBI indicated Annuitant's  
5 death, a call log from March 6, 2009 states that the  
6 "Annuitant" called, "inquiring as to where her 2-20-09  
7 check is." Burdick Decl. Ex. 5 at 1. Plaintiff's  
8 representative verified the alleged Annuitant's social  
9 security number and birth date, "believ[ing] it was  
10 her." Id. A same-day call with a different  
11 representative states that the Annuitant "is obviously  
12 not deceased." Id. at 2. Again, the "Annuitant"  
13 verified her social security number and date of birth.  
14 Id.

15 There is no genuine dispute of material fact as to  
16 whether the statute of limitations is tolled by  
17 Defendant's fraudulent concealment of the fact that she  
18 wrongfully retained Annuity payments owed to her  
19 deceased mother. For fraudulent concealment to toll  
20 the statute of limitations, something more than  
21 nondisclosure is required. Affirmatively deceptive  
22 conduct will suffice. Yumul, 733 F. Supp. 2d at 1131.  
23 Defendant affirmatively misrepresented to Plaintiff  
24 that the Annuitant was alive—even though she had been  
25 deceased for eleven years—by requesting continued  
26 Annuity payments and furnishing the Annuitant's  
27 identifying information to continue said benefits. The  
28 affirmatively deceptive conduct continued in earnest

1 from 2009 to 2013. Plaintiff believed the Annuitant  
2 was still alive and continued to believe so, as  
3 Defendant endorsed checks on behalf of her mother, the  
4 intended Annuitant, by signing them "Netha McClendon,"  
5 from April 12, 2009 to October 14, 2013. Burdick Decl.  
6 Ex. 6 at 26-80; Acme Paper Co. v. Goffstein, 125 Cal.  
7 App. 2d 175, 180 (Ct. App. 1954) (fraudulent  
8 concealment tolled statute of limitations in money had  
9 and received claim where employee falsely represented  
10 his role and fraudulently endorsed thirty-four  
11 different checks).

12 Fraudulent concealment tolls the statute of  
13 limitations "until plaintiff discovers, or in the  
14 exercise of reasonable diligence should have  
15 discovered, the facts on which its cause of action is  
16 based." Sears, Roebuck & Co. v. Blade, 139 Cal. App.  
17 2d 580, 587 (Ct. App. 1956). Only by May 29, 2014 did  
18 Plaintiff actually discover that Defendant had been  
19 depositing the mistaken payments, when she admitted to  
20 Plaintiff's representative that she had received the  
21 payments after her sister died, that they "went in  
22 [Defendant's] account," and that she would need to pay  
23 Plaintiff back. Burdick Decl. Ex. 4 at 7. And even  
24 through reasonable diligence, it is unlikely that  
25 following up with the Annuitant would have unveiled  
26 Defendant's scheme, as she was allegedly convinced that  
27 she was owed the Annuity payments and steadfastly  
28 committed to providing the Annuitant's personal

1 information to receive more checks. Moreover,  
2 Plaintiff's policy in 2009, of accepting telephonic  
3 verification of a birth date and social security number  
4 as confirmation of an annuitant's identity—coupled with  
5 Plaintiff's lack of a mechanism to investigate wrongful  
6 receipt of annuity payments—suggests that it was  
7 reasonable of Plaintiff not to automatically assume  
8 that any caller verifying an annuitant's information  
9 was a family member or shadowy figure wrongfully  
10 receiving annuity payments.<sup>10</sup> Indeed, the egregiousness  
11 and outlandishness of Defendant's actions—regardless of  
12 her claimed mistake of fact—underscores that Plaintiff  
13 acted with reasonable diligence. Sears, 139 Cal. App.  
14 2d at 591 (“[W]hether [Plaintiff] acted as a reasonably  
15 prudent [person] in not investigating [Defendant] must  
16 be viewed in the factual setting in which it was  
17 made.”)

18 In sum, Defendant does not counter Plaintiff's  
19 adequate evidence that supports tolling the statute of  
20

---

21 <sup>10</sup> Defendant argues that Plaintiff's internal policies  
22 dictate that it receive a written guarantee of the Annuitant's  
23 death. Defendant proffers an internal policy, which states that  
24 “[i]f the [RSPBI] report shows a client is deceased but in fact  
25 they are alive, we require a letter of instruction with signature  
26 guarantee stating that they are alive.” Parker Decl. Ex. 3 at 2,  
27 ECF No. 48-3. This argument is misplaced, and does not disturb  
28 the conclusion that summary judgment is appropriate as to the  
statute of limitations issue. The policy Defendant presents was  
effective on August 24, 2011, well after Plaintiff accepted  
Annuitant's birth date and social security information during the  
March 2009 phone call. This anachronistic piece of evidence does  
little to undermine Defendant's scheme of fraudulent concealment  
that tolls the Money Had and Received claim.

1 limitations until at least October 2013. The only  
2 scintilla of evidence that Defendant offers otherwise  
3 is that Plaintiff knew of the Annuitant's death as  
4 early as January 2009. Once again, Plaintiff does not  
5 contest this and it would have permanently ceased  
6 payments but for Defendant's fraudulent concealment.  
7 Thus, there is no genuine dispute as to whether the  
8 statute of limitations merited tolling until October  
9 2013. The Complaint was appropriately filed in May  
10 2015.

11 4. Money Had and Received

12 The Court now turns to whether there is a genuine  
13 dispute of material fact as to whether Plaintiff has  
14 proven its Money Had and Received Claim.

15 A claim for Money Had and Received makes a  
16 defendant indebted to a plaintiff "for money had and  
17 received by the defendant for the use of the  
18 plaintiff." Kandel v. Brother Int'l Corp., No. CV  
19 08-1040 DSF (RCx), 2009 WL 9100406, at \*1 (C.D. Cal.  
20 Feb. 13, 2009) (citation omitted). Although the claim  
21 is one at law, it arises in equity when "one person has  
22 received money which belongs to another and which in  
23 equity and good conscience . . . should be returned."  
24 Hendrickson v. Octagon, Inc., Nos. 14-cv-01416 CRB,  
25 2016 WL 7033781, at \*13 (N.D. Cal. Dec. 2, 2016)  
26 (internal quotation marks omitted) (quoting Mains v.  
27 City. Title Ins. Co., 34 Cal. 2d 580, 586 (1949)). The  
28 elements are as follows: (1) defendant received money;

1 (2) the money defendant received was for plaintiff's  
2 use; and (3) defendant is indebted to plaintiff.  
3 Fireman's Fund Ins. Co. v. Commerce & Indus. Co., No.  
4 C-98-1060VRW, 2000 WL 1721080, at \*8 (N.D. Cal. Nov. 7,  
5 2000).

6 a. *Whether Defendant Received Money*

7 The Court gleans no genuine issue of material fact  
8 as to the evidence regarding this element. Plaintiff  
9 presents 80 checks, totaling \$240,000, endorsed by  
10 "Netha McClendon," the Annuitant, from January 2007 to  
11 October 2013, long after her death in January 1998.  
12 Burdick Decl. Ex. 6. Defendant herself admits that she  
13 deposited checks from Plaintiff into the joint bank  
14 account she had with her deceased mother, McClendon  
15 Decl. ¶ 7, and endorsed each check in her mother's (the  
16 Annuitant) name. Id. Defendant's December 2016  
17 deposition also leaves little doubt that she received  
18 and endorsed at least 80 checks from January 2007 to  
19 October 2013. McClendon Dep. 82:15-24, 83:24-84:2.

20 b. *Whether the Money Received was for*  
21 *Plaintiff's Use*

22 Defendant argues that because Plaintiff intended to  
23 pay the Annuitant, Netha McClendon, Plaintiff cannot be  
24 the intended beneficiary. Opp'n 7:11-14. Plaintiff  
25 counters that the Annuity payments were made for its  
26 own benefit because it was fulfilling its contractual  
27 obligations to pay the Annuitant under the contract.  
28 Reply 4:15-16.

1        In Fireman's Fund, the insurer defendant received  
2        \$27,264,500 in a subrogation claim against a third-  
3        party insurer. 2000 WL 1721080, at \*1. Plaintiffs  
4        raised a claim for Money Had and Received, claiming  
5        entitlement to this amount because they paid \$5 million  
6        to the insured and thus gained an assignment of the  
7        insured's rights. Id. at \*7. Plaintiffs could not,  
8        however, show that any of the amount defendant received  
9        from a third-party insurer was for plaintiffs' use.  
10       The court stated: "defendant pursued subrogation  
11       against [the third-party insurers] by itself;  
12       plaintiffs elected not to join in the action . . .  
13       [p]laintiffs may have had a separate subrogation claim  
14       against those third-party insurers based on its \$5  
15       million payment to the insured. But plaintiffs cannot  
16       establish that any portion of the money received by  
17       defendant was for plaintiffs' use." Id. at \*8.  
18       Nevertheless, the court noted circumstances under which  
19       a plaintiff could show the money was intended for its  
20       own use; for instance, if defendant received money as a  
21       result of its scam and "induced [the money] under the  
22       guise that it would be used for plaintiffs." Id.  
23       (citation omitted). The key, the court explained, was  
24       that defendant "received money *for the use of the*  
25       *plaintiff.*" Id. (emphasis in original).

26       Plaintiff has demonstrated there is no triable  
27       issue of fact whether the Annuity payments were  
28       intended for its use. The facts here slot neatly into

1 the example provided in Fireman's Fund: Defendant  
2 received the Annuity overpayments from her scam of  
3 endorsing her mother's signature on the checks. She  
4 induced the payments under the guise that the money was  
5 for Plaintiff's use in the sense that Plaintiff would  
6 send the money to fulfill its obligations to pay the  
7 Annuitant under the contract.

8 Defendant insists that the money was only for the  
9 Annuitant—not the insurance company Plaintiff's—use.  
10 This blinkered approach to the definition of a  
11 beneficiary ignores the realities of litigating a Money  
12 Had and Received claim. Per Defendant, in the instance  
13 of an annuity or insurance contract, only the payee is  
14 the intended beneficiary. Under Defendant's logic,  
15 only the payee can stake out a claim for Money Had and  
16 Received; any time a company with an Annuity contract  
17 raises a claim, it is defeated.

18 It is not uncommon that an insurance company, bank,  
19 or other third-party will raise a Money Had and  
20 Received claim even though the insured or payee was the  
21 one who literally received the benefit of the money at  
22 issue. The Fifth Circuit rejected this type of  
23 argument—that a plaintiff insurance company lacked  
24 "standing" because a financial recovery on the Money  
25 Had and Received claim would only benefit its insured  
26 after the insured's employee had "pilfered and filched  
27 checks through the financial filter of forged  
28 endorsements." Peerless Ins. Co. v. Tex. Commerce



1 Bank-New Braunfels, N.A., 791 F.2d 1177, 1178 (5th Cir.  
2 1986). The Fifth Circuit summarily disposed of this  
3 argument:

4 Whether styled as a "standing" argument or more  
5 properly as an assertion that Peerless is not a  
6 real party in interest, Texas Commerce's claim  
7 is frivolous. Peerless has a real pecuniary  
8 interest in this case. Any recovery from Texas  
9 Commerce reduces Peerless' obligation to North  
10 American and brings Peerless closer to the point  
11 where it can begin, through proceedings against  
12 other parties, to recover the money it paid to  
13 North American . . . [w]e refuse to accept such  
14 a result.

15 Id. at 1181.

16 Here too, allowing Plaintiff to recover from  
17 Defendant would reduce its obligation to the  
18 Annuitant—or in this case, her estate—and uphold its  
19 contractual obligations to pay the Annuitant (the plans  
20 do not designate a beneficiary to whom Plaintiff could  
21 otherwise pay). Granting summary judgment as to the  
22 Money Had and Received claim allows Plaintiff to start  
23 recovering the \$500,000 it mistakenly paid due to  
24 Defendant's avarice. Denying summary judgment based on  
25 Defendant's specious and fallacious argument that only  
26 the Annuitant—and not the insurance company who paid  
27 her hundreds of thousands of dollars pursuant to an  
28 Annuity contract—stands to benefit from the payments

1 would lead to an incorrect result.

2 *c. Whether Defendant is Indebted to Plaintiff*

3 The third element effectively measures whether  
4 Defendant has returned the ill-gotten money to  
5 Plaintiff. No dispute of material fact as to this  
6 element exists; Defendant has yet to reimburse  
7 Defendant for nearly \$240,000 in wrongful proceeds.  
8 Defendant did not return the payments, as evidenced by  
9 letters from December 18, 2013, January 21, 2014, and  
10 April 29, 2014 requesting that Defendant remit Annuity  
11 overpayments from January 20, 1998 to October 20, 2013.  
12 Burdick Decl. Ex. 3. In each subsequent letter,  
13 Plaintiff noted that it had not received any response  
14 or payment. *Id.* Defendant also acknowledged her  
15 indebtedness to Plaintiff during the May 29, 2014 phone  
16 conversation, stating that she would have to "make the  
17 payments back" and requesting the contact information  
18 of the Annuities Department to which she should send  
19 the reimbursement. Burdick Decl. Ex. 4 at 6, 11-12.

20 *d. Whether Defendant was an Innocent*

21 *Beneficiary that Reasonably Relied to Her*  
22 *Detriment*

23 Defendant argues that granting summary judgment on  
24 the Money Had and Received claim is inappropriate even  
25 if there are no genuine disputes regarding the  
26 elements, as she has a viable defense. Defendant  
27 argues that she is an innocent beneficiary who did not  
28 know of Plaintiff's mistaken payments and detrimentally

1 relied on the payments while spending the money on the  
2 "necessities of life." Opp'n 4:12-13, 5:6-7.

3 In Bank of America v. Sanati, the court briefly  
4 touched upon the "detrimental reliance by an innocent  
5 beneficiary" theory that Defendant espouses. In that  
6 case, Mr. Sanati's Bank of America erroneously  
7 transferred an unintended principal portion (\$203,750)  
8 of his bank account and accrued interest to the joint  
9 account he held with his wife. 11 Cal. App. 4th 1079,  
10 1082 (Ct. App. 1992). The Court recognized that  
11 detrimental reliance by an innocent beneficiary was a  
12 "widely acknowledged" defense to restitution. Id. at  
13 1084. While the court permitted the bank to receive  
14 restitution from the unintended beneficiaries and  
15 granted the motion for summary judgment based on a  
16 different defense, Defendant's case is distinguishable  
17 from Sanati even from a cursory glance at the facts.  
18 In Sanati, the court considered whether the "discharge  
19 for value" rule impeded Bank of America from recovering  
20 the erroneously-transferred funds. But unlike here,  
21 the Sanati defendants were always intended recipients  
22 of the funds; indeed, Mr. Sanati arranged for Bank of  
23 America in London to send monthly accruing interest  
24 from his separate account to his joint account with Ms.  
25 Sanati. By contrast, Defendant was never the intended  
26 recipient of the Annuity payments here—the Annuity  
27 contract very clearly states that the Annuitant had no  
28 designated beneficiary to receive remaining payments

1 after the Annuitant's death. Compl. Ex. 1.

2 Defendant's defense makes little sense then; if she  
3 is not even a designated beneficiary for the Annuity,  
4 it defies logic for her to argue that she is an  
5 innocent beneficiary. This emphasis on the actual,  
6 intended beneficiary in a Money Had and Received claim  
7 took shape in Lowery, where the court granted summary  
8 judgment for a Money Had and Received claim as to an  
9 attorney defendant because the plaintiff had only paid  
10 money to the attorney's client, a motion-picture  
11 distribution company. Like the attorney defendant in  
12 Lowery—ancillary to the proper flow of payments between  
13 plaintiff and the distribution company—Defendant is not  
14 even a proper player in a Money Had and Received claim,  
15 let alone an innocent beneficiary. Even if she were,  
16 her argument that she is "innocent" is weakened by the  
17 fact that she improperly endorsed the Annuitant's  
18 signature on countless checks.

19 In contrast to Defendant's insistence that she did  
20 not know the payments were not meant for her, the  
21 Annuity contract terms clearly state that Defendant  
22 never should have received Annuity payments, let alone  
23 after the Annuitant had died. First, the Annuity  
24 Contract from August 13, 1992 very clearly states,  
25 "[w]e will make annuity payments as specified on the  
26 Policy Schedule as long as the Measuring Life [Netha  
27 McClendon] is living. If the Measuring Life dies before  
28 all guaranteed payments have been made, the remaining

1 guaranteed payments will be paid, when due, to the  
2 Designated Beneficiary." Burdick Decl. Ex. 1 at 3.  
3 Defendant was not a Designated Beneficiary, let alone  
4 mentioned anywhere in the Annuity contract. Indeed,  
5 the space to designate a beneficiary reads "Not  
6 Applicable," and states that "This section does not  
7 apply if Life Only Option is chosen." Id. at 1. The  
8 annuitant had the "Single Life Immediate Annuity"  
9 option. Id. Defendant wanly protests that she was  
10 unaware of the contractual terms and continued to  
11 endorse checks thinking she was the beneficiary, per  
12 her mother and her sister's orders. Burdick Decl. Ex.  
13 4 at 7, 9; McClendon Decl. ¶ 7. This is not enough to  
14 generate a triable issue of material fact.  
15 Defendant's, her mother's, and her sister's ignorance  
16 of the Annuity terms-whether willful, imprudent, or  
17 otherwise-have no place in the legal argument for Money  
18 Had and Received and do not create a triable issue of  
19 material fact as to this claim.

20 Contrary to Defendant's "innocent beneficiary"  
21 theory, the evidence indicates that Plaintiff  
22 mistakenly paid Defendant. "A plaintiff may bring a  
23 claim for money had and received if the plaintiff has  
24 paid money under the mistaken belief that he was under  
25 a duty to do so." Lowery v. Blue Steel Releasing,  
26 Inc., No. CV 02-0003-DSF(CTx), 2004 WL 6215611, at \*7  
27 (E.D. Cal. Nov. 1, 2005) (citation omitted). A  
28 plaintiff is entitled to restitution for mistaken

1 payment if defendant induced the mistake through fraud.  
2 Id. Plaintiff sent mistaken overpayments it thought it  
3 owed to the Annuitant, operating under the assumption  
4 that she was still alive. These mistaken payments were  
5 induced through Defendant's fraud of calling Plaintiff,  
6 pretending to be her mother through corroborating  
7 information, and requesting continued payments.

8 The only shred of contrary evidence Defendant  
9 offers is her self-serving statements that she  
10 continued to deposit payments because her mother told  
11 her that she wanted Defendant and her now-deceased  
12 sister, Delores McClendon, to share the Annuity  
13 proceeds after her death. Opp'n 5:4-5. This mistaken  
14 belief was also apparently perpetuated by Defendant's  
15 now-deceased sister. Defendant unconvincingly protests  
16 that she was unaware that the Annuity was only for her  
17 mother's benefit.<sup>11</sup> Apparently, Defendant believed that  
18 the monthly payments would continue after Annuitant's  
19 death until all sums had been paid out. Opp'n 5:1-3,  
20 4:27-5:1. This argument is unconvincing and has no  
21 place in the elements and law for Money Had and  
22 Received.

23 At bottom, Defendant fashions a theory that mistake  
24 of fact or a defendant's willful blindness to an  
25 Annuity contract's terms can dismantle a Money Had and  
26 Received claim. Defendant provides no case law to

---

27  
28 <sup>11</sup> However, both are deceased and unable to provide  
declarations or exhibits to shore up Defendant's arguments.

1 support this novel theory, nor does she provide a  
2 scintilla of evidence to doubt that the Annuity was  
3 only intended for the Annuitant, regardless of a  
4 mother's well-meaning wishes for her daughters to  
5 posthumously share in her Annuity. Accordingly, the  
6 "innocent beneficiary" defense is unavailing, and there  
7 is no triable issue of material fact as to any of the  
8 elements required for a Money Had and Received claim.

### 9 **III. CONCLUSION**

10 Based on the foregoing, the Court **GRANTS**  
11 Plaintiff's Motion for Partial Summary Judgment [36]  
12 as to the Money Had and Received claim.

13  
14 **IT IS SO ORDERED.**

15  
16 DATED: January 26, 2017

RONALD S.W. LEW

17 **HONORABLE RONALD S.W. LEW**  
18 Senior U.S. District Judge  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28